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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

No. 98-10002

GARY GRAHAM, now known as
SHAKA SANKOFA,

Petitioner,

v.

GARY JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

REPLY TO BRIEF IN OPPOSITION

Petition For Writ of Certiorari to The
United States Court of Appeals For The Fifth Circuit

RICHARD H. BURR*
1630 Castle Court, Ste. A
Houston, Texas 77006
(713) 523-2299
(713) 523-3833 (fax)

JACK B. ZIMMERMANN
770 South Post Oak Lane, Ste. 620
Houston, Texas 77056
(713) 552-0300
(713) 552-0746 (fax)

Counsel for Petitioner

*Counsel of Record

TABLE OF CONTENTS

Table of Authorities.....ii

Argument

1. The Attorney General conspicuously tries to downplay the fundamental miscarriage of justice that will occur if Mr. Sankofa is executed without a full and fair inquiry into the merits of his claims..... 1

2. The Attorney General fails to acknowledge that the principles underlying *Stewart v. Martinez-Villareal* and *Calderon v. Thompson* reasonably called for the Fifth Circuit (a) to treat the 1998 petition as the 1993, pre-AEDPA petition, or (b) to recall and amend its mandate in the appeal of the denial of the 1993 petition to see that Mr. Sankofa received the merits hearing that the court had found in 1996 he was entitled to -- thereby avoiding application of the AEDPA to Mr. Sankofa..... 6

3. If that portion of the AEDPA providing a statute of limitations were applicable to Mr. Sankofa's case, no issue respecting its application can properly be considered by the Court because the lower courts did not address any such issue..... 9

TABLE OF AUTHORITIES

Cases

Calderon v. Thompson, 523 U.S. 538, 118 S.Ct. 1489 (1998).....7,8

Faulder et al. v. Texas Board of Pardons and Paroles, Order, Nos. A-98-CA-801-SS, A-98-CA-803-SS, United States District Court for the Western District of Texas, December 28, 1998 (unpublished).....5,6,7

Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999).....2,10

Graham v. Johnson, 45 F.Supp.2d 555 (S.D.Tex. 1999).....10

Graham v. Collins, 829 F.Supp. 204 (S.D.Tex. 1993).....3,4

McCleskey v. Zant, 499 U.S. 467 (1991).....3

State ex rel. Holmes v. Third Court of Appeals, 885 S.W.2d 389 (Tex.Crim.App. 1994).....3,6

Schlup v. Delo, 513 U.S. 298 (1995).....3,4

Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618 (1998).....7,8

Statutes

18 U.S.C. § 3005.....11

28 U.S.C. 2244(b)(2)(B)(ii).....3

TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a)(2).....3

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

In its effort to persuade the Court that the issues presented by Mr. Sankofa in his petition for writ of certiorari are not worthy of the Court's consideration, Respondent's brief in opposition makes the reasons for granting certiorari even stronger. As much from what the Attorney General does not argue as from what he does argue, the brief in opposition should strengthen the Court's resolve to give plenary review to the questions presented by Mr. Sankofa.

1. The Attorney General conspicuously tries to downplay the fundamental miscarriage of justice that will occur if Mr. Sankofa is executed without a full and fair inquiry into the merits of his claims.

There is no hint of concern in the brief in opposition that a person innocent of murder may be on the brink of execution without having had any merits inquiry into the ineffective assistance provided by his trial counsel and the startling quantity of crime scene evidence that points to his innocence. Knowing that others have this concern after reviewing the facts of Mr. Sankofa's case, however, the Attorney General takes four steps to try to allay the legitimate concerns raised by Mr. Sankofa's case. None of these efforts can allay these concerns.

The Attorney General's first effort is to provide ten pages' worth of detail in his statement of facts about the evidence of aggravated assaults and robberies committed by Mr. Sankofa that was introduced in the penalty phase of Mr. Sankofa's trial. There is only one reason to have done this: to try to color the Court's perception on the wholly unrelated issues presented in the petition for writ of certiorari. That Mr. Sankofa committed and pled guilty to a string of other violent crimes committed <u>after</u> the shooting of Bobby Lambert – none of which was a homicide and none of which was committed in the same manner or in circumstances similar to the murder of Mr. Lambert – does not have any bearing on whether Mr. Sankofa committed, and was properly convicted of committing, the murder of Mr. Lambert. There is no

issue in the petition for writ of certiorari that depends in any way upon these facts. In the recent appeal to the Fifth Circuit, the same issues were before that court that are now before this Court. The only reference made by the Fifth Circuit to the evidence of other crimes was the following:

> During the punishment phase, the state demonstrated that from May 14 to May 20, 1981, Graham robbed some thirteen different victims in nine different locations, in each instance leveling either a pistol or a sawed- off shotgun at the victim. Two of the victims were pistol-whipped, one was also shot in the neck, an elderly man was struck with the vehicle Graham had stolen from him, and a fifty-seven-year-old woman was kidnapped and raped.

Graham v. Johnson, 168 F.3d 762, 765 n.3 (5th Cir. 1999). This is the kind of reference that is properly made to evidence that is a part of the case but that has no bearing upon the issues presented. By contrast, the Attorney General's presenting ten pages' worth of detail about these crimes – as much space as is devoted to the entire argument against granting certiorari – is a transparent attempt to bias the Court against Mr. Sankofa and to distract the Court from the gravity of the issues presented. Mr. Sankofa is paying the price for committing the non-capital crimes. He should not be required to pay with his life for a murder he did not commit.

The second effort made by the Attorney General to try to allay the concerns raised by Mr. Sankofa's case is to suggest that the Texas Court of Criminal Appeals made "presumptively correct" "implied and express factual findings" when it determined that Mr. Sankofa failed in his 1998 state habeas application "to satisfy the threshold showing of innocence required to file a successive state habeas application...." Respondent's Brief in Opposition, at 25 n.12. While this is not the stage of the proceedings and this is not the court to determine whether any deference should be given to the state court's factfindings, the Attorney General's assertion is misleading and should be understood as such.

In assessing whether the claims alleged in a successive habeas application under state law

should be considered on the merits, the Texas Court of Criminal Appeals must determine whether "by a preponderance of evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt." TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a)(2). To do this, the court must presume the evidence supporting innocence to be true — "an applicant ... must ... demonstrate that the newly discovered evidence, if true, creates doubt [about guilt]," *State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 398 (Tex.Crim.App. 1994) — and then measure it against the evidence at trial. Thus, the Court of Criminal Appeals' determination that the evidence of Mr. Sankofa's innocence was insufficient to require consideration of the claim on the merits is clearly **not** a finding, as the Attorney General suggests here, that the allegations of fact proffered in support of the claim were somehow insufficient to establish innocence. It is no more than a legal conclusion that the facts do not meet Texas' much higher standard for gauging innocence than the federal standard.[1] A state court's legal conclusion applying a different innocence standard is not binding in any way in a federal habeas proceeding.

The third effort made by the Attorney General to try to allay the concerns raised by Mr. Sankofa's case is to suggest that the federal district court in 1993 "rejected Graham's claim of innocence," citing *Graham v. Collins*, 829 F.Supp. 204, 207 (S.D.Tex. 1993). Respondent's Brief in Opposition, at 25 n.12. The Attorney General's assertion is, again, misleading. In the 1993 petition, Mr. Sankofa made two different kinds of claims of innocence. The first was a claim of innocence associated with a claim of ineffective assistance of counsel, which was made

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[1]The federal standard under the AEDPA is a "clear and convincing evidence" standard, 28 U.S.C. 2244(b)(2)(B)(ii), and under the Court's pre-AEDPA cases is a "probably," *i.e.*, more likely than not, standard. *Schlup v. Delo*, 513 U.S. 298, 322 (1995); *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). The state "no rational juror could have found" standard is the equivalent of the beyond a reasonable doubt standard.

in order to satisfy the then-existing threshold for presenting a substantive claim in a successive habeas petition. The second was a claim that because Mr. Sankofa was innocent the Eighth Amendment prevented his execution. In *Schlup v. Delo*, the Court explained that the first kind of innocence claim is "procedural" and the second is "substantive," 513 U.S. at 314, and that the standard of proof is much higher for a substantive claim of innocence. *Id.* at 314-316. In Mr. Sankofa's 1993 federal habeas proceeding, the district court did reject his substantive claim of innocence, as the Attorney General correctly recites in footnote 12 of his brief in opposition. However, this is not the claim of innocence that is operative in the present habeas proceeding. Rather, it is Mr. Sankofa's procedural claim of innocence that is at issue in the present proceeding. As to this claim of innocence, the district court assumed in 1993 that the allegations in the petition, if credited, would satisfy the procedural test of innocence.[2]

The final effort made by the Attorney General to try to allay the concerns raised by Mr. Sankofa's case is to suggest that Mr. Sankofa's interest in vindicating his innocence is adequately protected by Texas' clemency process. *See* Respondent's Brief in Opposition, at 28 (citing the case of Henry Lee Lucas, "who obtained executive clemency on claims of actual innocence through the same avenue available to Graham"). Such a suggestion urges the Court to

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[2]The district court explained, in reference to only a portion of the evidence of innocence,

> The affidavits of Sherian Etuk, Ronald Hubbard, Mervyn West, and Wilma Amos Antwine, if credited, would satisfy the *Kuhlmann* [*v. Wilson*, 477 U.S. 436, 452-454 (1986)] test. The state court has determined that two of these affidavits are not credible. Rather than defer to the state court's factual findings at this stage of the inquiry, the Court will assume arguendo that the evidence Graham has presented makes out a colorable showing of factual innocence.

829 F.Supp. at 208.

find solace in a procedure that a federal district court recently determined to be "extremely poor and certainly minimal." *Faulder et al. v. Texas Board of Pardons and Paroles*, Order, Nos. A-98-CA-801-SS, A-98-CA-803-SS, United States District Court for the Western District of Texas, December 28, 1998 (unpublished) [hereafter, "Order"]. In rejecting the claim of the petitioners in *Faulder* that the Texas Board of Pardons and Paroles' clemency procedure violates the "minimal" due process guarantees required of a capital clemency process, the district court nevertheless found that the clemency process in Texas is woefully inadequate. In sum, the court found that

> all pertinent information is not given to all Board members before they vote, and some information is inadvertently never provided to the Board members.... Members are provided with an opportunity to recast their votes in light of subsequent filings, but they are not required to re-attest that they have reviewed the entire petition. It is apparent that none of the members read every word on every line of every piece of paper in the clemency application.

Order, at 14-15.

> [The Board Chairman], obviously frustrated and angered by the petitioner's challenge to his process, testified adamantly that the Board has the power to call hearings, conduct investigations, interview petitioners, and request testimony. However, [he] concedes that the Board has not conducted any such activities since he began his tenure as Chair in 1995. This is remarkable, especially considering the facts that the Board has reviewed fifty-seven [capital clemency] petitions during the tenure of Rodriguez as Chair of the Board.[3]
>
> Only once has the Board recommended clemency to a death-row inmate. On June 26, 1998, Governor George W. Bush, in accordance with a recommendation by the Board of Pardons and

[3] Paul Prejean, who has been a member since 1993, testified no board member has ever requested a hearing or teleconference on any of the seventy-six clemency petition considered during his tenure. He has never voted in favor of a recommendation of clemency.

> Paroles, commuted the death sentence of Henry Lee Lucas to life imprisonment.[4]

Order, at 12 (footnotes in original).

With respect to claims of innocence as grounds for clemency, the district court found that

> [t]he [Board] members consistently testified that they considered a petitioner's guilt or innocence, but no member could specify with any particularity what he or she would look for to determine a recommendation for clemency.

Order, at 14 n.10.

The Board of Pardons and Paroles in April, 1993, denied Mr. Sankofa's request for clemency based upon innocence. *See State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 391 (Tex.Crim.App. 1994). Given Board's "extremely poor and certainly minimal procedure," *Faulder, supra*, and that in the only clemency application ever granted – which happened to be based on the applicant's innocence – the Attorney General and law enforcement joined the request for clemency, the Court should not avoid plenary review of Mr. Sankofa's case in reliance on the "failsafe" of clemency. That failsafe does not exist in Texas and has already failed Mr. Sankofa.

2. The Attorney General fails to acknowledge that the principles underlying *Stewart v. Martinez-Villareal* and *Calderon v. Thompson* reasonably called for the Fifth Circuit (a) to treat the 1998 petition as the 1993, pre-AEDPA petition, or (b) to recall and amend its mandate in the appeal of the denial of the 1993 petition to see that Mr. Sankofa received the merits hearing that the court had found in 1996 he was entitled to -- thereby avoiding application of the AEDPA to Mr. Sankofa.

There is no acknowledgment by the Attorney General that in light of the Fifth Circuit's

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[4] There was, of course, no evidence as to why this recommendation was made by the Board, but it is beyond dispute this action was requested by the Attorney General, law enforcement officials, as well as those representing the judicial system.

determination in 1996 that Mr. Sankofa's troubling claims warranted further factual inquiry on the merits, the Fifth Circuit may have been mistaken in 1999 when – even though no merits inquiry had yet occurred – it determined that the AEDPA had to be applied to Mr. Sankofa's case to preclude the very merits hearing that it had held was warranted. Even if the Attorney General disagrees that the principles underlying *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), required the Fifth Circuit to treat the 1998 petition as the 1993 petition, he cannot reasonably disagree that *Martinez-Villareal* can be read to support this outcome – yet he does. Further, even if the Attorney General disagrees that the principles underlying *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489 (1998), required the Fifth Circuit to grant Mr. Sankofa's motion to recall its mandate in the appeal of the 1993 case, he cannot reasonably disagree that *Thompson* and the equitable principles underlying it can be read to support this out come – yet he does. In these respects, the Attorney General's position is indefensible.

As set forth in the petition for writ of certiorari, Mr. Sankofa has argued that the rationale of *Martinez-Villareal* called for the Fifth Circuit to treat Mr. Sankofa's 1998 petition as his 1993 petition for purposes of whether the AEDPA would be applied to the petition. The reason for this is that *Martinez-Villareal* treats the re-filing of a petition presenting a claim that had previously been dismissed without prejudice and not on the merits, as premature, as the equivalent of re-filing a petition presenting claims that had previously been dismissed for lack of exhaustion. 118 S.Ct. at 1622. In this context, the Court explained that the subsequent petition was not a separate application, but in reality the same application as the one dismissed without prejudice:

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but **this does not mean that there were two separate applications**, the second of

> which was necessarily subject to § 2244(b). **There was only one application for habeas relief**, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.

118 S.Ct. at 1621 (emphasis supplied).

The Attorney General argues that the rationale of *Martinez-Villareal* is useful only in determining whether the subsequent petition is to be treated as successive under the rules governing successive petitions. Since Mr. Sankofa's 1993 petition was clearly a successive petition, the argument goes, *Martinez-Villareal* has nothing to do with determining whether his 1998 petition should be treated under the successive petition rules.

This argument misses the point made in the petition, for as we argue there, if under *Martinez-Villareal* the 1998 petition should be treated as the 1993 petition, the petition would still be successive because the 1993 petition was successive, but the law governing the petition should be pre-AEDPA law. Since *Martinez-Villareal* reasonably supports this position, it is plainly important enough to the nation's jurisprudence for the Court to consider whether the Fifth Circuit erred in holding that it does not.

Similarly, the Attorney General's cramped reading of *Calderon v. Thompson* is indefensible. Reading *Thompson*'s warning that "a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision ... is subject to AEDPA," 118 S.Ct. at 1500, as subjecting any prisoner-initiated motion to the AEDPA ignores the very reason *Thompson*'s directive does not apply in Mr. Sankofa's case. As we noted in the petition, Mr. Sankofa's motion to recall the mandate was not a request to reconsider in any manner the "merits of the underlying decision." Rather, it was a request that the Fifth Circuit recall the mandate in order to give effect to the merits of the underlying decision. The concern underlying *Thompson* was that

motions to recall mandates not be used to avoid the application of AEDPA to claims that are new, post-AEDPA claims or pre-AEDPA claims reinvigorated by post-AEDPA-discovered evidence. Mr. Sankofa's motion sought neither of these ends. He sought only to avoid the fundamental miscarriage of justice in his case of having the merits hearing ordained by the Fifth Circuit snatched away by the unforeseen consequences of dismissal for further exhaustion. It is reasonable to read *Thompson* as supporting Mr. Sankofa's motion rather than defeating it. Accordingly, it is plainly important enough to the nation's jurisprudence for the Court to consider whether the Fifth Circuit erred in giving the same cramped reading to *Thompson* that the Texas Attorney General gives it.

3. If that portion of the AEDPA providing a statute of limitations were applicable to Mr. Sankofa's case, no issue respecting its application can properly be considered by the Court because the lower courts did not address any such issue.

If Mr. Sankofa's 1998 habeas petition is treated as a new petition subject to the AEDPA rather than as the continuation of the 1993 pre-AEDPA petition, the applicability of various AEDPA provisions to the 1998 petition must be considered. In this regard, the petition presents two questions concerning the impermissible retroactive effect of AEDPA's successive petition provisions. To his credit, the Texas Attorney General makes no serious argument that application of AEDPA's successive petition provisions to Mr. Sankofa's case does not have an impermissible retroactive effect, or that this issue is not worthy of the Court's review. However, to the Attorney General, the retroactive effect of AEDPA's successive petition provisions is inconsequential because in his view AEDPA's statute of limitations, in any event, bars consideration of Mr. Sankofa's claims. On this basis, he urges the Court to deny review of the concededly cert-worthy questions concerning the retroactive effect of AEDPA's successive petition provisions.

The flaw in the Attorney General's argument is that the applicability of the statute of limitations to successive petitions and, if applicable, the equities of applying the statute of limitations to bar Mr. Sankofa's 1998 petition, are issues hotly disputed by Mr. Sankofa and wholly unresolved by the lower courts in his case. In both the district court and the Fifth Circuit, the Attorney General made the same statute of limitations argument he makes here. The district court did not mention, much less address, this argument. *See Graham v. Johnson*, 45 F.Supp.2d 555 (S.D.Tex. 1999) (Appendix 2 to Petition for Writ of Certiorari). The Fifth Circuit mentioned the argument but explicitly did not address it:

> The state urged both in its briefs and in oral argument that we should deny Graham's Motion for Order Authorizing District Court to Consider Successive Habeas Petition because his current application is time-barred under 28 U.S.C. § 2244(d). We need not reach the limitations question, however, because Graham concedes, see infra Section III.C, that he cannot meet the requirements for the issuance of such an order [because of the successive petition provisions]. We express no opinion as to whether a court of appeals should consider the timeliness of a habeas application in deciding a prisoner's motion for authorization to file it.

Graham v. Johnson, 168 F.3d 762,787 n.20 (5th Cir. 1999) (Appendix 1 to Petition for Writ of Certiorari).

Counsel for Mr. Sankofa argued extensively in the briefing before the Fifth Circuit, *see* Reply Brief of Petitioner/Petitioner-Appellant, at 37-42, that AEDPA's statute of limitations did not apply to a federal habeas petitioner whose successive federal petition was pending at the time AEDPA was enacted, whose case was subsequently dismissed without prejudice, and who thereafter returned to federal court with the very same claims that had been pending long before enactment of AEDPA. In the ensuing oral argument before the Fifth Circuit, counsel reiterated and expanded his argument that the statute of limitations could not, consistent with due process,

be applied to Mr. Sankofa.[5]

In these circumstances, the Attorney General's intoning AEDPA's statute of limitations and its simple mathematical bright line rule cannot and should not be a factor in the Court's decision whether to grant certiorari.

For these reasons, and for the reasons set out in the petition for writ of certiorari, we respectfully urge the Court to grant the petition.

Respectfully submitted,

Richard H. Burr/by express permission Lisa Greenman
RICHARD H. BURR*
1630 Castle Court, Suite A
Houston, Texas 77002
(713) 523-2299
(713) 523-3833 (fax)

Jack B. Zimmermann/by express permission Lisa Greenman
JACK B. ZIMMERMANN
770 South Post Oak Lane, Suite 620
Houston, Texas 77056
(713) 552-0300
(713) 552-0746 (fax)

Counsel for Petitioner

*Counsel of Record

[5]Counsel also explained during oral argument that shortly after the 1996 decision by the Fifth Circuit dismissing Mr. Sankofa's federal petition for further exhaustion, Sankofa's only remaining attorney, Richard Burr, had to withdraw from further representation of Mr. Sankofa because of his appointment as counsel for Timothy McVeigh in the Oklahoma City bombing case pursuant to 18 U.S.C. § 3005. Because Texas does not provide a right to counsel for indigent successive state habeas applicants in advance of the filing of their habeas applications, Mr. Sankofa could not obtain substitute counsel and was unrepresented after Burr's withdrawal in the fall of 1996 and until Burr returned to Houston following the *McVeigh* trial. Mr. Sankofa, who is a high school dropout and has never attempted to develop self-representational skills, could not file a successive state habeas application on his own. Following his return to Houston, Mr. Burr represented Mr. Sankofa *pro bono* in the successive state habeas proceeding that was filed in April, 1998.

Certificate of Service

Certificate of Service

I hereby certify that I served a copy of the foregoing pleading on counsel of record for Respondent by depositing these documents with the United States Postal Service, first class postage prepaid, addressed to Assistant Attorney Tommy L. Skaggs, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, whose telephone number is (512) 936-1600, this 16th day of September 1999.

All parties required to be served have been served.

Richard H. Burr / by express permission
Lisa Greenman

RICHARD H. BURR
630 Castle Court, Suite A
Houston, Texas 77002
(713) 523-2299
(713) 523-3833 (fax)

Member of the Supreme Court Bar